AHLI-AHLI SURUHANJAYA YANG MEMBENTUK SURUHANJAYA SIASATAN MENGENAI RAKAMAN KLIP VIDEO YANG MENGANDUNGI IMEJ SEORANG YANG DIKATAKAN PEGUAMBELA DAN PEGUAMCARA BERBUAL MELALUI TELEFON MENGENAI URUSAN PELANTIKAN HAKIM-HAKIM

v.

TUN DATO' SERI AHMAD FAIRUZ DATO' SHEIKH ABDUL HALIM & OTHER APPEALS

FEDERAL COURT, PUTRAJAYA
ZULKEFLI MAKINUDIN FCJ
RAUS SHARIF FCJ
ABDULL HAMID EMBONG FCJ
[CIVIL APPEALS NO: 01(i)-1-2011(W), 01(i)-2-2011(W) & 01(i)-3-2011(W)]
13 SEPTEMBER 2011

ADMINISTRATIVE LAW: *Judicial review - Remedies - Certiorari - Application to quash findings of the Royal Commission of Enquiry set up under s. 2 of the Commission of Enquiry Act 1950 - Whether findings and recommendations reviewable under O. 53 r. 2(4) Rules of the High Court 1980 - Whether against public policy to allow findings of Commission to be challenged in the courts*

The appellant, the Royal Commission of Enquiry ('the Commission') was set up pursuant to s. 2 of the Commission of Enquiry Act 1950 ('Act 119') to, *inter alia*, enquire and ascertain the authenticity of a video clip recording containing a controversial material relating to the judiciary, depicting images of a person engaged in a telephone conversation relating to the appointment of judges. The respondents were among those summoned to give evidence before the Commission. Aggrieved with the findings of the appellant which implicated the respondents, the respondents filed their applications for leave for an order of *certiorari* to quash those findings of the Commission. The respondents alleged that the findings of the Commission were tainted due to bias and prejudice and that the findings were contrary to the principle of law. The High Court dismissed the applications on the ground, *inter alia*, that what the respondents sought to quash was not a decision within the ambit of O. 53 r. 2(4) of the Rules of the

High Court 1980 ("RHC"). Dissatisfied, the respondents (separately) appealed against the decision of the High Court Judge to the Court of Appeal. The Court of Appeal, by a majority decision, allowed the respondents' appeals and granted leave to commence a judicial review proceeding to quash the findings of the Commission. The appellant appealed against the decision of the Court of Appeal, submitting that (i) the Commission was merely making findings and not decisions, thus they were not reviewable under O. 53 r. 2(4) of the RHC and (ii) it was against public policy to allow the findings of the Commission to be challenged in the courts.

Held (allowing the appeals with no order as to costs)
Per Raus Sharif FCJ:

(1) Only a person adversely affected by the decision of a public authority shall be entitled to make the application for judicial review (O. 53 RHC). Herein, there was no dispute that the Commission was a public authority. However, the Commission was not a decision making body. The Commission does not make legal decisions. The Commission's report consisted of findings and recommendations of the Commission on the terms of reference entrusted upon them to do so. Being mere findings and recommendations, it did not bind the respondents, not even the Government. (para 27)

(1a) Although the Commission had made strong findings that there was 'sufficient cause to invoke the Sedition Act 1972 and the Penal Code against various individuals mentioned in the video clip' which implicate the respondents, such findings remain mere findings. The Commission's findings had not affected their legal rights and were therefore not amenable to judicial review. The Commission merely investigates and does not decide. Thus, the findings and recommendations of the Commission did not come within the ambit of O. 53 RHC and were not legal decisions that affected the rights of the respondents as envisaged under O. 53 r. 2(4) RHC. (paras 28 & 29)

(2) The findings of any Commission established under Act 119 should not be subjected to judicial review. If the proceedings of the Commission are allowed to be challenged either at the outset or during its continuance by prohibition or at its

A conclusion by certiorari, its purpose will come to naught. It will make the setting-up of the Commission a meaningless exercise. Hence, it was against public policy to subject the findings and recommendations of the Commission to judicial review. Herein, the video clip circulation on the internet had
B sparked furious debate questioning the independence of the judiciary. The image of the judiciary was being ridiculed. Obviously it was not in the best interest of the judiciary and the nation as a whole to allow such debate and bad perception to continue without the public knowing the truth
C of the matter. It was for that purpose the Commission comprising eminent persons of high standing, was set up to conduct a factual investigation on behalf of the Government and to make the necessary recommendations for the betterment of the judiciary. Now the Commission had come
D out with its findings, it did not make any sense if such findings were allowed to be reviewed by the courts. (paras 44 & 45)

Bahasa Malaysia *Translation of Headnote*

E Perayu, Suruhanjaya Siasatan Diraja ('Suruhanjaya') ditubuhkan di bawah s. 2 Akta Suruhanjaya Siasatan 1950 ('Akta 119') untuk, antara lain, menyiasat dan menentukan kesahihan rakaman klip video yang mengandungi bahan kontroversi berhubungan dengan
F kehakiman, menggambarkan imej seseorang sedang berbual dalam telefon mengenai pelantikan hakim-hakim. Responden-responden adalah antara orang-orang yang dipanggil untuk memberi keterangan di hadapan Suruhanjaya. Terkilan dengan penemuan-penemuan perayu yang telah mengimplikasikan responden-
G responden, responden-responden telah memfailkan permohonan-permohonan mereka untuk kebenaran perintah *certiorari* membatalkan penemuan-penemuan Suruhanjaya. Responden-responden mendakwa bahawa penemuan-penemuan Suruhanjaya adalah berat sebelah dan bersifat prejudis dan penemuan-
H penemuan adalah bertentangan dengan prinsip undang-undang. Mahkamah Tinggi telah menolak permohonan-permohonan tersebut atas alasan, antara lain, bahawa apa yang responden-responden telah cuba membatalkan bukan keputusan dalam lingkungan A. 53 k. 2(4) Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Tidak
I puas hati, responden-responden (secara berasingan) telah merayu terhadap keputusan Hakim Mahkamah Tinggi ke Mahkamah

Rayuan. Mahkamah Rayuan, melalui satu keputusan majoriti, membenarkan rayuan-rayuan responden-responden dan memberi kebenaran untuk memulakan prosiding semakan kehakiman untuk membatalkan penemuan-penemuan Suruhanjaya. Perayu merayu terhadap keputusan Mahkamah Rayuan, dengan hujahan bahawa (i) Suruhanjaya hanya membuat penemuan dan bukan keputusan oleh itu tidak boleh dikaji semula di bawah A. 53 k. 2(4) KMT dan (ii) ia adalah bertentangan dengan dasar kepentingan awam untuk membenarkan penemuan-penemuan Suruhanjaya dicabar di mahkamah.

Diputuskan (membenarkan rayuan tanpa perintah untuk kos)

Oleh Raus Sharif HMP:

(1) Hanya seseorang yang terjejas dengan keputusan pihak berkuasa awam berhak untuk membuat permohonan semakan kehakiman (A. 53 KMT). Di sini, tiada pertikaian bahawa Suruhanjaya adalah pihak berkuasa awam. Walaubagaimana pun, Suruhanjaya bukan badan membuat keputusan. Suruhanjaya tidak membuat keputusan undang-undang. Laporan Suruhanjaya mengandungi penemuan-penemuan dan cadangan-cadangan Suruhanjaya atas terma-terma rujukan yang diamanahkan kepada mereka. Kerana ia adalah penemuan-penemuan dan cadangan-cadangan semata-mata, ia tidak mengikat responden-responden, juga tidak mengikat Kerajaan.

(1a) Walaupun Suruhanjaya telah membuat penemuan-penemuan yang kuat bahawa terdapatnya 'sebab-sebab yang mencukupi untuk menggunakan Akta Hasutan 1948 dan Kanun Keseksaan terhadap beberapa individu-individu yang disebut di dalam klip video' yang telah mengimplikasikan responden-responden, penemuan-penemuan itu hanyalah penemuan. Penemuan-penemuan Suruhanjaya tidak menjejaskan hak undang-undang mereka dan oleh itu tidak tertakluk kepada semakan kehakiman. Suruhanjaya hanya menyiasat tetapi tidak memutuskan. Oleh itu, penemuan-penemuan dan cadangan-cadangan Suruhanjaya bukan dalam lingkungan A. 53 KMT dan bukan keputusan undang-undang yang telah menjejaskan hak-hak responden seperti yang dibayangkan di bawah A. 53 k. 2(4) KMT.

(2) Penemuan-penemuan Suruhanjaya yang ditubuhkan di bawah Akta 119 tidak harus tertakluk kepada semakan kehakiman. Jika prosiding-prosiding Suruhanjaya dibenarkan untuk dicabar sama ada pada peringkat awal atau semasa penerusan secara larangan atau di akhirnya melalui *certiorari*, tujuannya akan menjadi sia-sia. Ia akan membuat penubuhan Suruhanjaya satu pelaksanaan tidak bermakna. Oleh itu, ia adalah bertentangan dengan dasar kepentingan awam untuk penemuan-penemuan dan cadangan-cadangan Suruhanjaya tertakluk kepada semakan kehakiman. Di sini, pengedaran klip video di internet telah mencetuskan pendebatan hebat mempersoalkan kebebasan badan kehakiman. Imej badan kehakiman telah dicemuh. Ternyata ia bukan dalam kepentingan badan kehakiman dan seluruh negara untuk membenarkan pendebatan dan persepsi buruk sebegitu diteruskan tanpa orang awam mengetahui perkara sebenar. Ia adalah untuk tujuan ini Suruhanjaya yang terdiri daripada orang-orang kenamaan bertaraf tinggi ditubuhkan untuk mengendalikan satu siasatan nyata bagi pihak Kerajaan dan untuk membuat cadangan-cadangan yang perlu untuk kebaikan Badan Kehakiman. Suruhanjaya telah menyatakan penemuan-penemuannya, ia tidak masuk akal untuk penemuan-penemuan tersebut dibenarkan untuk disemak oleh mahkamah.

Case(s) referred to:

Association of Bank Officers, Peninsular Malaysia v. Malaysan Commercial Bank Association [1990] 3 MLJ 228 ***(refd)***

Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor [1997] 4 CLJ 725 HC ***(refd)***

Council of Civil Service Unions v. Minister for Civil Service [1984] 3 All ER 935 ***(refd)***

Dato' Kanagalingam Veluppillai v. The Royal Commission Of Enquiry On The Video Clip Recording Of Images Of A Person Purported To Be An Advocate And Solicitor Speaking On The Telephone On Matters Regarding The Appointment Of Judges & Other Cases [2010] 2 CLJ 720 HC ***(refd)***

In re Application by Ong Eng Guan for an Order of Prohibition in re appointment of S.H.D Elias [1959] 1 LNS 35 HC ***(refd)***

John Peter Berthelsen v. The Director-General of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

Mohd Nordin Johan v. The Attorney-General, Malaysia [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 FC ***(refd)***

R v. Collins; Ex Parte ACTU SOLO Enterprises Pty Ltd [1976] 8 ALR 691
Re Chua Ho Ann [1963] 1 LNS 109 HC ***(refd)***

Re Erebes Royal Commission; Air New Zealand Ltd v. Mahon (No 2) [1981] 1 NZLR 618 ***(refd)***
Tun Dato' Hj Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors [1988] 1 CLJ (Rep) 294 FC ***(refd)***

Legislation referred to:
Commission of Enquiry Act 1950, ss. 2, 3
Courts of Judicature Act 1964, s. 96
Rules of the High Court 1980, O. 53 rr. 2(4), 3(1)

Citizenship Ordinance 1957 [Sing], s. 22

For the appellant - Azizah Hj Nawawi; AG's Chambers
For the 1st respondent - Dato' Bastian Pius Vendargon (Dato' Mahinder Bastian Singh Dulku, Dato' Muzaffirah Tun Ahmad Fairuz & Fifi Natasya Jamaluddin with him); M/s Firah & Partners
For the 2nd respondent - Dato' VK Lingam; M/s VK Lingam & Co
For the 3rd respondent - B Lobo (Dato' Hazman Ahmad with him); M/s Omar Ismail Hazman & Co

[Appeal from Court of Appeal, Civil Appeals No: W-01-1-2009 & W-01-2-2009]

Reported by Suhainah Wahiduddin

JUDGMENT

Raus Sharif FCJ:

Introduction

[1] There are three separate appeals before us filed by the Attorney General. The appeals were against the decisions of the Court of Appeal dated 28 August 2010. The Court of Appeal, which heard the three appeals together, had by a majority decision allowed the respondents' appeal against the decision of the High Court in refusing the respondents' application for leave for judicial review.

[2] At the High Court the respondents with two others had (by separate applications) sought for leave to apply for an order of *certiorari* to quash the relevant parts of the report of the Royal Commission of Enquiry ("the Commission") set up pursuant to s. 2 of the Commission of Enquiry Act 1950 ("Act 119"). All the five applications were made under O. 53 r. 3 of the Rules of the High Court 1980 ("the RHC").

[3] On 7 February 2011, this court pursuant to s. 96 of the Courts of Judicature Act 1964 ("the CJA") granted the Attorney General's application for leave to appeal against the decision of the Court of Appeal on a single question, namely:

> Whether the findings of the Commission of Enquiry pursuant to section 3 of the Commission of Enquiry Act 1950 is reviewable under Order 53 Rules of the High Court 1980.

[4] We heard the three appeals together on 14 June 2011 and it was agreed by all parties that the decision in Appeal No: 01(i)-2-2011(W) will bind Appeal No: 01(i)-1-2011(W) and Appeal No: 01(i)-3-2011(W). The respondent in Appeal No: 01(i)-2-2011(W) is Dato' Kanalingam a/l Vellupillai, an advocate and solicitor and better known as Dato' V.K Lingam. The respondent in Appeal No: 01(i)-1-2011(W) is Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim, a former Chief Justice. The respondent in Appeal No: 01(i)-3-2011(W) is Tun Haji Mohd Eusoff bin Chin, also a former Chief Justice.

[5] For the purpose of arguments in these appeals, all the parties agreed that they would be referring to the appeal records of the respondent in Appeal No: 01(i)-2-2011(W).

Background Facts

[6] The relevant facts and events leading to these appeals are these. On 19 September 2007, a video clip recording containing a controversial material relating to the judiciary surfaced on the internet. It depicted images of a person engaged in a telephone conversation relating to the appointment of judges.

[7] The exposure was indeed explosive. The Government on 25 September 2007, as an immediate response, set up an Independent Panel comprising of three members, namely Tan Sri Dato' Seri Haidar bin Mohamed Noor, Dato' Mahadev Shankar and Tan Sri Dato' Lee Lam Thye, to investigate into the authenticity of the video clip recording. On 6 November 2007, the Independent Panel submitted its report to the Government recommending that a Commission be set up.

[8] The Government agreed with the recommendation and took steps to advice His Majesty the Yang di-Pertuan Agong for the establishment of a Commission. On 17 November 2007, the Government announced the setting up of the Commission.

[9] On 12 December 2007, pursuant to s. 2 of Act 119, the Commission was constituted. The members of the Commission appointed were Tan Sri Dato' Seri Haidar bin Mohamed Noor, Tan Sri Datuk Amar Steve Shim Lip Kiong, Dato' Mahadev Shankar, Puan Sri Zaitun Zawiyah binti Puteh and Professor Dato' Dr Khoo Kay Kim. Tan Sri Dato' Seri Haidar bin Mohamed Noor was appointed as the Chairman of the Commission. Dato' Abdullah Sani bin Ab. Hamid was appointed Secretary to the Commission.

[10] Pursuant to s. 3 of Act 119, the Commission was specified with the subject of enquiry with the following terms of reference:

(i) To enquire and ascertain the authenticity of the video clip;

(ii) To enquire and identify the speaker, the person he was speaking to in the video clip and the persons mentioned in the conversation;

(iii) To enquire and ascertain the truth or otherwise of the content of the conversation in the video clip;

(iv) To determine whether any act of misbehavior has been committed by person or persons identified or mentioned in the video clip; and

(v) To recommend any appropriate course of action to be taken against the person or persons identified or mentioned in the video clip, should such person or persons be found to have committed any misbehavior.

[11] The Commission commenced its enquiry by way of a public hearing on 14 January 2008 and concluded its hearing on 15 February 2008. The respondents were among those summoned to give evidence before the Commission.

[12] On 9 May 2008, the Commission submitted its report to the Yang di-Pertuan Agong. The Commission's Report was transmitted to the Government who decided to make it available to the public on 20 May 2008.

[13] The respondents claimed that they are aggrieved by the findings of the Commission. They filed their applications for leave for an order of *certiorari* to quash those findings of the

A Commission which implicate them. They alleged the findings of the Commission are tainted due to bias and prejudice and those findings were contrary to the principle of law.

[14] The High Court (on application and agreement of the parties
B concerned) heard the five applications together. At the hearing of the applications, the Senior Federal Counsel, Datin Azizah Nawawi ("the SFC") who appeared on behalf of the Attorney General, objected to the applications on the ground *inter alia,* that what the respondents and two others sought to quash was not a
C decision within the ambit of O. 53 r. 2(4) of the RHC, but the collective findings of the Commission. She contended that the respondents could not be construed as persons 'adversely affected' by the Commission's findings.

D **[15]** The respondents argued otherwise. They contended that the findings of the Commission are decisions within the ambit of O. 53 r. 2(4) and had adversely affected them. Alternatively they argued that para. 1 of the Schedule to the CJA gave the court wide powers to issue an order of *certiorari* for any purpose and
E therefore O. 53 r. 2(4) of the RHC which purport to limit such right to a 'decision' of public authority was *ultra vires*. It was also argued the threshold for the granting of leave under O. 53 r. 3(1) is a low threshold and they should be given their day in court to argue the substantive motion.

F **[16]** The High Court Judge upheld the objection by the Attorney General and dismissed all the applications with costs. The judgment of the High Court can be found in [2010] 2 CLJ 720. The respondents (separately) appealed against the decision of the High Court Judge to the Court of Appeal.

G

[17] On 28 August 2010, the Court of Appeal, by a majority decision, allowed the respondents' appeals. The respondents, in effect were granted leave to commence a judicial review proceeding to quash the findings of the Commission. The judgment
H of the Court of Appeal can be found in [2011] 4 AMR 324.

[18] We heard the appeals on 14 June 2011 and adjourned the matter for our decision. We now give our decision and the reasons for the same.

I **Decision**

[19] The single issue that calls for determination is whether the findings of the Commission is reviewable under O. 53 of the RHC.

Thus, before dealing further with the matter it would be convenient to reproduce the relevant provisions of O. 53:

> 2. (1) An application for any of the reliefs specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 (other than an application for an order of *habeas corpus*) shall be in Form 111A.
>
> (4) Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.
>
> 3. (1) No application under this Order shall be made unless leave therefore has been granted in accordance with this rule.
>
> (2) An application for leave must be made *ex parte* to a Judge in Chambers and must be supported by a statement setting out the name and description of the applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying the facts relied on.
>
> (3) The applicant must give notice of the application for leave not later than three days before the hearing date to the Attorney General's Chambers and must at the same time lodge in those Chambers copies of the statement and affidavits.

[20] It is clear from the above that a person who is adversely affected by the decision of a public authority can make an application for a judicial review of that decision. But the person must first obtain leave before his substantive motion can be heard. At the leave stage without the need to go into depth of the abundance of authorities, suffice for us to state that the threshold for the granting of such leave is very low. Leave is normally granted if the application is neither frivolous nor vexatious and it justifies further argument on a substantive motion. (See *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Bank Association* [1990] 3 MLJ 228, *Bandar Utama Development Sdn Bhd & Anor v. Lembaga Lebuhraya Malaysia & Anor* [1997] 4 CLJ 725, *Mohd Nordin Johan v. The Attorney-General, Malaysia* [1983] 1 CLJ 130; [1983] CLJ (Rep) 271 and *John Peter Berthelsen v. Director-General of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160).

[21] The question is, do the issues raised by the respondents justify further argument on a substantive motion. The SFC submitted that the answer should be in the negative. She gave two reasons. Firstly, the Commission was merely making findings

A and not decision and thus not reviewable under O. 53 r. 2(4) of the RHC. Secondly, it is against public policy to allow the findings of the Commission to be challenged in our courts.

Are Findings Of The Commission "Decisions"?

B **[22]** The Commission in their report to the Yang di-Pertuan Agong, presented its executive summary which reads:

> Having considered all the materials before us, that is the testimonies of 21 witnesses, 116 exhibits and 17 statutory
C declarations including that submissions we are please to summarised our Findings on the Five Terms of Reference herein as follows:
>
> 1. *To enquire and ascertain the authenticity of the video clip.*
>
> D The Commissioners find that the video clip, Ex C7 is authentic.
>
> 2. *To enquire and identify the speaker, the person he was speaking to in the video clip and the persons mentioned in the conversation.*
>
> E The Commissioners find:
>
> (a) that the person on the phone is Dato' V.K. Lingam;
>
> (b) that the person to whom he was speaking on the phone is Tun Ahmad Fairuz bin Dato' Sheikh Abdul Halim;
>
> F
> (c) that the Chinese mentioned in the conversation had ended is Mr Loh Mui Fah; and
>
> (d) that other person mentioned in the conversation will be identified in the body of the report.
>
> G
> 3. *To enquire and ascertain the truth or otherwise of the content of the conversation in the video clip.*
>
> The Commissioners find the content of the conversation in the video clip is true in substance and in material particulars.
>
> H
> 4. *To determine whether any act of misbehavior has been committed by person or persons identified or mentioned in the video clip.*
>
> The Commissioners find sufficient evidence of misbehavior on the part of certain individuals or personalities identified or
I mentioned in the video clip. In this connection, we refer to the body of the report.

5. *To recommend any appropriate cause of action to be taken against the person or persons identified or mentioned in the video clip, should such person or persons be found to have committed any misbehavior.*

The Commissioners find sufficient cause to invoke the Sedition Act 1948, the Legal Profession Act 1976, the Official Secrets Act 1972 and the Penal Code against the various individuals mentioned in the video clip which we have elaborated in the Report. We do not discount the possibility of other laws being contravened. We leave it to the Attorney General, Malaysia and the Malaysian Bar Council to take the appropriate actions against the personalities implicated. Additionally, we are proposing to the Government for the necessary reforms including the establishment of a Judicial Appointments Commission.

[23] Dato' V.K Lingam submitted that the findings of the Commission as contained in the report submitted to the Yang di-Pertuan Agong which was published and made available to the public are clearly 'decisions' under O. 53 r. 2(4) of the RHC. He argued that the words 'to enquire and ascertain', 'to enquire and identify', 'to determine' and 'to recommend' in the five Terms of Reference denote that the Commission is required to make decisions. According to him, under the five Terms of Reference the Commission had a choice to decide one way or the other. For example, they were entitled to decide that the video clip was authentic or not authentic. They could decide that the contents of the video clip were true or they were not true. They also had a choice to decide that there was misbehavior or no misbehavior on the other individuals named. Therefore, the Commission had a choice and they settled on one choice based on their assessment of the evidence and that amount to a decision. Further Dato' V.K Lingam submitted that the words 'find', 'conclusion' and 'we hold' used by the Commission in their findings to the five Terms of Reference, also denote that the Commission was making 'decisions'.

[24] Dato' V.K Lingam submitted further that the findings of the Commission are in fact 'decisions' and the findings and/or decisions that he had committed criminal misbehavior is a grave attack on his reputation and his reputation has been gravely tarnished and injured. Therefore, he argued that he is a person who is adversely affected by the 'decisions' of the Commission

A within the meaning of O. 53 r. 2(4) of the RHC. Accordingly, he argued that the majority decision of the Court of Appeal was right in allowing his application for leave for judicial review.

[25] Dato' Bastian Pius Vendargon and Mr Lobo representing
B Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim and Tun Haji Mohd Eusoff bin Chin respectively, also argued along the same lines as that of Dato' V.K Lingam. They are also saying that the findings of the Commission are in fact decisions within the meaning of O. 53 r. 2(4) of the RHC and their clients were
C adversely affected by the decisions. They also argued that their clients should be given their day in court to submit on the substantive motion.

[26] It is trite law that the purpose of an order for certiorari is
D to quash the legal effect of a decision. In England, in the case of *Council of Civil Service Unions v. Minister for Civil Service* [1984] 3 All ER 935 the House of Lords held that for a decision to be susceptible to the court's reviewing powers, there must first be a decision by a decision maker or a refusal by him to make a
E decision, and, that decision must affect the aggrieved party by either altering his rights or obligations or depriving him of the benefits which he has been permitted to enjoy.

[27] We adopt the same view. Under the scheme of O. 53 of the RHC, only a person adversely affected by the decision of a public
F authority shall be entitled to make the application for judicial review. In the present case, there is no dispute that the Commission is a public authority. But we are of the view that the Commission is not a decision making body. A closer look at the Commission's report will reveal that the Commission does not
G make legal decision. The report consists of findings and recommendations of the Commission on the five Terms of Reference entrusted upon them to do. Being mere findings and recommendations, it do not bind the respondents, not even the Government.

H

[28] No doubt in the present case the Commission had made strong findings that there are "sufficient cause to invoke the Sedition Act 1948 and the Penal Code against various individuals mentioned in the video clip" which implicate the respondents, but
I such findings remain mere findings. Such findings are not

reviewable as the respondents' legal rights are not directly affected by the findings or that the benefit they have been permitted to enjoy had not been deprived of.

[29] Thus, in Dato' V.K Lingam's case here, despite the Commission's findings that he had committed criminal misbehavior, his status as an advocate and solicitor is intact. The fact that he is appearing before us is a clear testimony that his legal rights has not been adversely affected. Similarly, for Tun Dato' Seri Ahmad Fairuz bin Dato' Sheikh Abdul Halim and Tun Haji Mohd Yusoff bin Chin, it is not shown to us that they have been deprived of the benefit which they had been permitted to enjoy before. Clearly, the Commission's findings had not affected their legal rights and therefore not amenable to judicial review.

[30] A similar stand was taken in Australia. In *R v. Collins; Ex Parte ACTU SOLO Enterprises Pty Ltd* [1976] 8 ALR 691, the High Court held that the report of a Royal Commission appointed to inquire into the production of refining and marketing and pricing in Australia of petroleum products are not amenable to judicial review.

[31] In that case, the applicant sought an order nisi for *certiorari* to quash the report of the Commission on the grounds (1) that the conclusion were incorrect and there was no evidence before the Commission from which they could reasonably have been reached; (2) that the contents of the Appendix IV of the Commission's report were incorrect and the applicant was afforded no opportunity of learning of such contents, or of contesting their accuracy, before the report was published; and (3) that the Commission departed from its terms of reference.

[32] Stephen J after examining the nature of the reporting function of the Royal Commission concluded at p. 695:

> The instant Royal Commission is just such a mere commission of inquiry and report, its compulsive powers it derives from Commonwealth statute law, and they are not under challenge. The reported conclusions of the Commission no doubt serve to inform the mind of government and may in consequence, to a greater or lesser extent, be instrumental in shaping the course of future legislative or executive initiatives, but they neither directly determine, or of their own force affect, rights nor does the reporting of particular conclusions satisfy some condition precedent to the exercise of power which will in turn affect rights or otherwise give rise to legal consequences.

[33] Further at p. 699, Stephen J concluded:

> Whatever may be the tenor of the Commission's report, it will not legally affect the rights of the applicant; with or without such a report, and even, no doubt, in direct opposition to any recommendations in it, the minister might, in his absolute discretion, take action affecting the applicant's crude oil entitlements, or might decide to take no action at all. Accordingly, the nature of the Commission's report neither directly affects nor in any way subjects to a new hazard the rights of the applicant; the hazard of ministerial intervention has always been present and it is only the degree of likelihood of that intervention occurring in a sense adverse to the applicant's interests which is increased by the actual nature of the Commission's recommendation. That cannot, in my view suffice to justify curial intervention, by means of *certiorari*, in the case of a Royal Commission whose sole function is to inquire and report to the executive the result of its inquiries, whose mode of conducting its inquiry is entirely unfettered, either by statute or by executive direction, and whose report neither directly affects rights nor is a condition precedent to the affecting of them.

[34] We wish to point out that the Royal Commission in *R v. Collins (supra)* in its report had also made a strong finding against the applicant stating that the applicant 'deliberately deceived the Minister for Minerals, thereby inducing him to raise no objection to the transaction'. But the Australian High Court held that such findings have no legal effect or binding force on the applicant and thus not amenable to judicial review.

[35] A similar stand was also taken in Singapore. Buttrose J in *Re Chua Ho Ann* [1963] 29 MLJ 193 held that the order of prohibition does not lie against the Committee of Inquiry established under s. 22 of the Singapore Citizenship Ordinance 1957. At p. 194, Buttrose J said:

> The committee is a fact finding committee. Its function is to inquire into and investigate the facts and convey information thereon to the Minister. It is not required to make recommendations. It makes no decision on the result of its findings which have no legal or binding force, affect no rights and impose neither liabilities nor obligations.
>
> The Minister in only required to have regard to the committee's report in making his order but having done so it is open to him to refrain from acting on any advice tendered in it. It is to the

Minister and the Minister alone that the decision to deprive a person of his citizenship is entrusted. The committee of inquiry is merely conducting a factual investigation on behalf of the Minister in an advisory capacity.

[36] Back home, we have the case of *Tun Dato' Hj. Salleh Abas v. Tan Sri Dato' Abdul Hamid Omar & Ors* [1988] 1 CLJ (Rep) 294, where Hashim Yeop Sani SCJ (as he then was) at p. 297 said:

The function of the Tribunal appointed under Article 125(3) of the Constitution is to enquire and investigate on the representation and then report to the Yang di-Pertuan Agong with any recommendation it may make. The Tribunal is a body which investigates and does not decide. It is performing a constitutional function. The Tribunal should not therefore be restrained from performing its constitutional function.

[37] It can be seen from the above cases that the findings of a Commission of Inquiry with no legal authority to determine the question affecting the right of the subject, are not amenable to judicial review. As such we are unable to subscribe to the arguments by Dato' V.K Lingam that the Commission established under Act 119 is just like any other inferior tribunals such as tribunals established under the Industrial Relation Act 1967, Consumer Protection Act 1999 and Housing Developers (Control and Licensing) Act 1966, where their decisions are always subjected to judicial review.

[38] We wish to point out that the decisions of those tribunals are amenable to judicial review because the decisions made are legal decisions. For instance, the Industrial Court established under the Industrial Relation Act 1967, in a constructive dismissal's case, has to make decision whether an employee is constructively dismissed by the employer or otherwise. If the Industrial Court decides in favour of the employee, the employer will be the aggrieved person following the decision of the Industrial Court. This is because the consequences of the order would be either the employer has to reinstate the employee or pay the employee compensation *in lieu* of reinstatement. In that way, the Industrial Court makes a legal and binding decision.

[39] Nevertheless that does not happen in our case. The Commission merely investigates and does not decide. Its findings and recommendations are not binding on anybody, not even the Government. Thus, we hold that the findings and recommendations of the Commission do not come within the ambit of O. 53 of the RHC. In this respect, we agree with the minority decision of the Court of Appeal in upholding the decision of the learned High Court judge that there was no inconsistency between O. 53 r. 2(4) of the RHC and para. 1 of the Schedule to the CJA. The word "decision" in O. 53 r. 2(4) do not run foul of para. 1 of the Schedule to the CJA and thus not *ultra vires*.

[40] In light of the above, we are not able to agree with the majority decision of the Court of Appeal that the determination of whether the findings and recommendations of the Commission constitute 'decisions' within the ambit of O. 53 r. 2(4) should be taken up at the hearing of the substantive motion. We are of the view that there is no necessity to grant the application for leave on this ground when at the leave stage it can clearly be determined that the findings and recommendations of the Commission are not legal decisions that affect the rights of the respondents as envisaged under O. 53 r. 2(4) of the RHC. On this ground alone, the appeals should be allowed.

Public Interest

[41] But there is another more important reason. We are of the view that there is a strong policy consideration that it is against public interest to allow the findings of the Commission to be challenged in our courts. This was recognised by Rose CJ many years ago in *In re Application by Ong Eng Guan for an Order of Prohibition in re appointment of S.H.D Elias* [1959] 1 LNS 35. In that case, it was the application was for an order of prohibition to restrain a Commissioner appointed under the Inquiry Commissions Ordinance on the ground that he was biased. The Attorney General raised a preliminary objection *inter alia* that the writ of prohibition did not lie against a Commissioner appointed under the Inquiry Commissions Ordinance. The court upheld the preliminary objection. CJ Rose in discussing the issue whether the findings of the Commission of Inquiry is amenable to judicial review held:

> In various countries of the Commonwealth during the last thirty or forty years there must have been many Commissions of Inquiry appointed but no authority was cited to me – and I myself have been able to find none – which indicates that either the writ of prohibition or the writ of *certiorari* has been held to lie. This seems to me to be significant in that one of the more common grounds upon which *certiorari* is claimed is that the tribunal has exceeded its jurisdiction. Now, one of the most common criticisms directed against reports of Commissions of Inquiry in various territories has been that the Commission in its report has gone outside its terms of reference. Again and again such criticisms have been made in the appropriate Legislative Assembles but in no case has any interested party, so far as the law reports demonstrate, had recourse to *certiorari*.
>
> It seems to me that a clear inference is to be drawn from this. Moreover, looking at the matter broadly from the point of view of the public interest, it seems to me that the usefulness of Commissions of Inquiry would be impaired if their proceedings were allowed to be challenged either at the outset or during their continuance by prohibition or at their conclusion by *certiorari*.
>
> The available remedies against a report which may be regarded as unsatisfactory are twofold. First, the appointing authority, in other words the government of the day, may reject all or any of the recommendations; secondly, an interested party or indeed any member of the public who is aggrieved by the report may initiate criticism in Parliament, State Council or Legislative Assembly as the case may be. In the very rare case – and indeed I do not recollect having heard of any such – of a Commission of Inquiry so misconducting itself as to create a scandal, no doubt the appointing authority has the power to withdraw the authority which is has itself bestowed.
>
> In my opinion, therefore, both public interest and past practice point irresistibly to the conclusion that the correct view is that neither of these two writs, *certiorari* or prohibition, lie in the case of a Commission of Inquiry.

[42] Dato' V.K Lingam pointed to us that there has been a case in New Zealand, which held that the findings of the Royal Commission are amenable to judicial review. He was referring to the case of *Re Erebes Royal Commission; Air New Zealand Ltd v. Mahon (No 2)* [1981] 1 NZLR 618. The New Zealand Court of Appeal stated the legal position in New Zealand as follows:

A It is established in New Zealand that in appropriate proceedings the Courts may prevent a Commission of Inquiry – whether a Royal Commission, a statutory Commission or perhaps a combination of the two – from exceeding its powers by going outside the proper scope of its inquiry. The basic principle was clearly accepted by this Court in *Re Royal Commission on Licensing* [1945] NZLR 665. See especially the judgment of Myers CJ.

[43] With due respect, we are not persuaded to follow the legal position in New Zealand. We are of the view that the findings of any Commission established under Act 119 shall not be subjected to judicial review. Over the years, there had been a number of Commissions being set-up under Act 119 but we do not remember any of their findings and recommendations had ever been allowed to be challenged by way of judicial review. We find no reason to allow this application too. If the proceedings of the Commission are allowed to be challenged either at the outset or during its continuance by prohibition or at its conclusion by *certiorari,* its purpose will come to naught. It will make the setting-up of the Commission a meaningless exercise, and also a waste of public fund.

[44] Hence, we hold that it would be against public policy to subject the findings and recommendations of the Commission to judicial review. In the present case, the video clip circulation on the internet had sparked furious debate questioning the independence of the judiciary. The image of the judiciary is being ridiculed. Obviously, it is not in the best interest of the judiciary and the nation as a whole to allow such debate and bad perception to continue without the public knowing the truth of the matter. It was for that purpose the Commission comprising eminent persons of high standing, was set-up to conduct a factual investigation on behalf of the Government and to make the necessary recommendations for the betterment of the judiciary. Now the Commission had come out with its findings, it does not make any sense if such findings are allowed to be reviewed by our courts.

[45] For the above said reasons, we would answer the question posed to us in the negative. We rule that the findings of the Commission of Enquiry under s. 3 of the Commission Enquiry Act 1950, is not reviewable under O. 53 of the Rules of the High Court 1980.

[46] Accordingly, the appeals are allowed. The orders of the Court of Appeal are hereby set aside.

[47] Now after hearing the parties on costs, we make no order as to costs here and the courts below.